A Manual on the Charter of Rights and Freedoms

Saskatchewan Human Rights Commission
January 1983

A M A N U A L

O N

THE CHARTER OF RIGHTS AND FREEDOMS

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IX. GLOSSARY OF TERMS

I. INTRODUCTION

Canadian law is a body of rules which govern human activity within the country. "Law" (understood in a general sense) affects every conceivable sphere of human activity by either: 1) express declaration, 2) necessary implication, or 3) even by remaining completely silent on the matter. A person is free to act insofar as the law does not forbid the activity. This is expressed in the legal maxim, "Everything is legal except that which is by necessary implication or expressly declared to be illegal".

II. THE SOURCES AND FORMS OF CANADIAN LAW

A. Statute and Common Law

There are two main sources of law in Canada; statute law and common law.

1. Statute Law

Statute law refers to that body of laws which is developed by a governmental legislature. Proposed legislation appears before a legislative body (eg. the federal Parliament or provincial legislature) in the form of a bill. The specific wording of a bill is then debated in the legislature and in committees, and if the bill is assented to by a majority of the members and is then proclaimed to be law by the Queen's representative, it is referred to as a "statute" or an "act". Such legislation is generally very specific on a given subject matter. For example, The Saskatchewan Human Rights Code is an Act of the Legislature of Saskatchewan, which by specific words, establishes certain legal rules regarding human rights, and further establishes an administrative law enforcement agency to see that the provisions of The Saskatchewan Human Rights Code are observed. The various provisions of the statute are given a number so that any specific legal rule contained in the Code can be easily referred to.

In addition to this, provincial legislatures delegate to municipal bodies some of their authority to make "written" law, so that cities or rural municipalities have some limited authority to pass "by-laws" on certain matters of local concern.

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2) Common Law and Case Law

Generally when we speak of the common law we are referring to a body of legal rules that were developed over the years by judges as they decided specific cases. This British tradition of recognizing certain rules not included in any statute as law is centuries old. Indeed, prior to the nineteenth century a relatively small part of English law was statute based.

The common law is to some extent less specific, if not less certain, than statute law. But specificity and certainty are maintained in common law rules by operation of the doctrine of stare decisis. Stare decisis is a term describing the policy of the courts to stand by precedent; to adhere to a legal principle once it is laid down by the courts.

In addition to formulating and refining common law rules, the courts also interpret the specific words of a statute, ultimately determining their legal meaning. The doctrine of stare decisis applies here as well, so that over the years as the courts deal with issues arising out of a particular statute, a body of case law (ie. legal opinions arising out of specific cases) develops, which tends to give authority to specific interpretations of law, and this determines to a great extent the legal effect of a specific statute.

B. Public Law and Private Law

There are two main forms of Canadian law; Public Law and Private Law.

1) Public Law

Public Law refers to those areas of law which are concerned with the powers, rights and duties of the state in its political

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and sovereign capacity. In Canada, some forms of law properly called public law are:

a) Constitutional Law

Constitutional law regulates the forms of government in Canada. For example, it establishes the division of powers between federal and provincial governments, and by means of the Charter of Rights and Freedoms, sets down the fundamental principles which are to regulate a government not only with other governments but with individual citizens and groups of citizens as well. These constitutional laws are the supreme laws of the country.

b) Administrative Law

This form of law regulates the activity of various organizations or branches of government, prescribing in detail the manner in which these governmental bodies or agencies must conduct themselves. Loosely speaking, administrative law is concerned with the legal aspects of the administration of government bureaucracies.

c) Criminal Law

Criminal law is that branch of law which deals with the state's role in the prosecution of criminal wrong-doing. Generally, a private citizen lodges a complaint with the police, and the state (usually in the person of the Crown prosecutor) decides whether to initiate criminal proceedings.

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2) Private Law

Private law is that branch of the law which is administered among citizens and is concerned with the definition, regulation, and enforcement of rights among individuals or groups of individuals. In the private law sphere, the redress for wrong-doing is most often personally undertaken by the party harmed, often to receive compensation for a loss or to assert a private right. In this way, private law differs from public law where legal action against wrong-doing (particularly in the criminal law field) is undertaken by the state in response to some public interest in the wrongful act of an individual.

Some areas of private law are:

a) Contract Law - governs the contractual relations between persons.

b) Tort Law - is concerned primarily with negligent and less often with intentional wrong-doing, with a view to providing an injured person with compensation from the person at fault. In this regard a single wrongful act, for example bodily assault, may give rise to criminal liability (where the state has a public interest in punishing violent activity) and to liability in tort where the injured party may look to whoever is at fault to compensate him for his harm or loss.

c) Property Law - concerns the regulation of transfers and the rights arising out of possession of personal property or real estate

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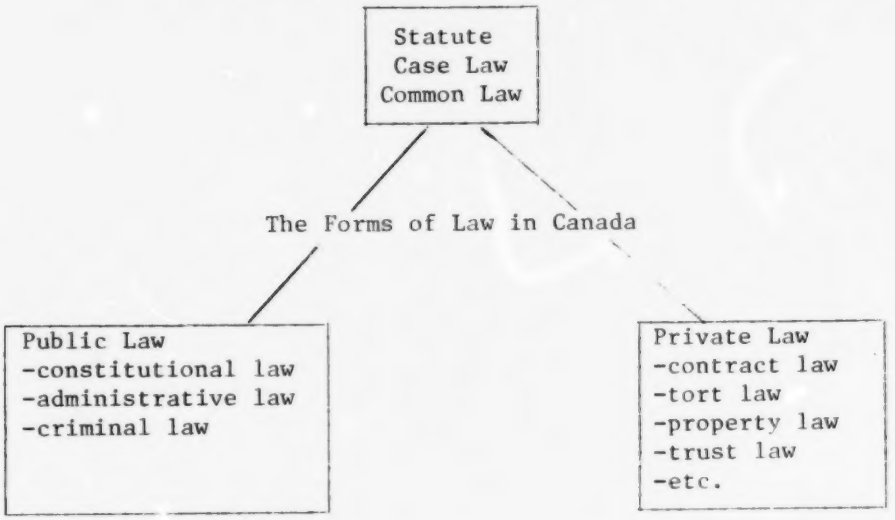
THE SOURCES OF LAW IN CANADA



III. INTRODUCTION TO CANADIAN CONSTITUTIONAL LAW

Canada is a constitutional monarchy. The English Monarch is the head of state and is represented in Canada by the Governor General and the Lieutenant Governors of the provinces. This is the Executive branch of government and very little real power is vested in it.

The power to govern lies in the legislative branch of government; the federal and provincial legislatures, particularly in the federal or provincial cabinets and the office of Prime Minister or Premier.

Canada, unlike England, is a federal state, which means legislative authority (that is the ability to pass laws on a given subject) is divided between the federal and provincial governments. This division of powers is largely set out in Sections 91 and 92 of the Constitution Act, formerly the British North America Act (B.N.A. Act). Neither level of government has the authority to pass laws which are properly the exclusive concern of the other level of government. This is why we have a uniform criminal law in Canada, because the power to make criminal law rests in the federal Parliament and not the provincial legislatures.

Canada's fundamental constitutional document is the Constitution Act. This new Act essentially adds to and repeals certain sections of the British North America Act which formerly contained the major part of Canada's written constitutional law.

Therefore, Canada's basic governmental institutions remain intact. Except for some minor amendment, the Constition Act retains the separation of powers that existed under the B.N.A. Act between the federal and provincial governments and between the executive, legislative and judicial branches of government, and indeed the largest part of the Constitution Act concerns itself with that separation.

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One significant change is that Canada can now, on its own, amend the Constitution Act. The forerunner of the Constitution Act, the British North America Act, was an act of the United Kingdom Parliament in London, England. If Canada wanted to amend the BNA Act it had to petition the U. K. Parliament for the amendment. The Constitution Act contains its own amending formula and procedures, so that if the amending formula is followed, Canada can amend the Constitution Act without petitioning the U. K. Parliament. To a large extent this is what we mean when we say the Constitution Act is patriated.

What particularly distinguishes the Constitution Act from its predecessor, the British North America Act, is that the new Constitution Act specifically includes certain human rights as a basic part of our written constitutional law, and these are contained in Part 1 of the Constitution Act, which is called the Canadian Charter of Rights and Freedoms.

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IV. PHILOSOPHY OF HUMAN RIGHTS

Part I of the Constitution Act, the Canadian Charter of Rights and Freedoms represents a new and significant development in Canadian constitutional law. One important reason for enshrining human rights principles in the constitution was to reaffirm Canada's commitment to international human rights agreements which Canada had already signed.

Two of these United Nations agreements, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, reflect in their opening words a basic philosophy of human rights. They state:

> Considering that in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,
>
> Recognizing that these rights derive from the inherent dignity of the human person,...

This wording has been incorporated directly into a number of provincial human rights codes including The Saskatchewan Human Rights Code (see s.3).

In developing a philosophy of human rights the above quotation focuses our thoughts on several important ideas:

1) that the same rights must be possessed by all people; all people are possessed of equal rights;
2) that all people have dignity; and that dignity is inherent, meaning that it is not acquired or earned by virtue of what we do but merely because we are all fellow members of the human family;
3) that every human right is ultimately derived from the dignity possessed by every individual by the sole virtue of being a human person;

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4) that the rights that all people have are inalienable; that they cannot rightfully be taken away;

5) that the recognition of these inherent inalienable rights is the foundation of freedom, justice and peace.

The opening words of the International Covenants recognize that the justification and force of human rights flows from the innate value and dignity of the human person.

In its political and economic life, society often values a person because of his or her merit; people are elected or advanced because of the valued qualities they possess. Yet, one cannot distinguish one person as being more meritorious than another without adverting to the qualities of him/her that are meritorious. If the individual is valued solely for his/her merit, then it is the qualities of him/her that are meritorious and the individual as an individual ceases to be an object of value.[1]

Yet, laws generally are directed at persons regardless of their merit, that is, the same laws apply to persons regardless of their worth or value in the eyes of society. To make sense of the fact that our political system accords all citizens identical legal status regardless of merit, we must conclude that society grounds its fundamental legal values not on personal qualities, but on the value of an individual as an individual. If personal rights are not justified by merit they can only be justified by "the value which persons have simply because they are persons...their human worth".[2]

A broad principle to determine just what types of rights would flow from the recognition of the innate worth of the human person is that "in a wide variety of cases, all persons are capable of experiencing the same values". For example, regardless of how A and B might differ, they would

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both require relief from hunger, lack of shelter, or insult and each would presumably benefit from such relief.

> In all cases where human beings are capable of enjoying the same goods, the intrinsic value of their enjoyment is the same, so that one person's well being is as valuable as any others. Choosing for oneself what one will do, believe, approve, say, read or worship has its own intrinsic value independently of the value of the things chosen...one man's freedom is as valuable as any others.[3]

If all persons have an equal capacity to enjoy these rights and if the existence of the capacity is the reason for ascribing the right, then all persons have the right to claim equality of treatment. Thus, a relevant principle which would permit some but not others to have certain rights would have to be based on the incapacity of some to enjoy a value or right to the same extent as someone else. Such comparisons among persons as the ability to bear pain due to the denial of a right or value are impossible to obtain, and we do know that the denial of the opportunity to experience these basic human goods or to satisfy fundamental human needs makes it impossible to live a full or satisfying life.[4] It is therefore irrational to distinguish among persons as to the possession of rights. The principle that no person should be treated differently from any other person or group of persons unless a relevant reason or principle exists for differentiating, is a fundamental principle of morality.

In Canada we also believe that the majority of citizens acting through their elected representatives have a democratic right to determine the law. Can it be said then that the majority has a democratic right to extend human rights protection to some groups but not to others?

Ronald Dworkin has sketched the philosophical model upon which such a proposition is based.[5] It is this: A government often defines a right

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by balancing the social cost of extending the right and the demands of the general public, against the proposed right of the individual. As Dworkin notes, this balancing of public and private interest has much appeal to lawyers and is established in political and judicial rhetoric.[6]

Yet, Dworkin insists, anyone who takes rights seriously must accept either or both of two important ideas. The first is the basic notion of human dignity, that "there are ways of treating a man that are inconsistent with recognizing him as a full member of the human community, and that such treatment is profoundly unjust". The second is that political equality is based on the notion that weaker members of a political community are entitled to the same respect and concern as the more powerful members have secured. An individual, therefore,

> has a fundamental right against the government, in the strong sense, like free speech, if that right is necessary to protect his dignity, or his standing as equally entitled to concern and respect or some other personal value or like consequence. It does not make sense otherwise.[8]

The invasion of a relatively important right is therefore a serious matter, because such an invasion necessarily implies that for some reason the individual is worthy of less respect, less concern and less equality of treatment. A philosophy of rights based on the "inherent dignity and the equal inalienable rights of all members of the human family" holds this to be a grave injustice. Thus, it is wrong in Dworkin's words to say that "inflating rights is as serious as invading them" because error o the side of the individual simply means paying a little more in social efficiency, "a little more of the same coin that it (the government) has already decided must be spent".[9] Error against the individual results in a far greater cost as it threatens to contradict and trivialize the values upon which our human rights are based. Dworkin concludes:

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> (this) model is indefensible. It rests...on a mistake... namely the confusion of society's rights with the rights of members of society. 'Balancing' is appropriate when the government must choose between competing claims of right...(the) model assumes the 'right' of the majority is a competing right that must be balanced in this way, but that, is a confusion that threatens to destroy the concept of individual rights...[10]

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[1] Vlactos, J. "Justice and Equality" in Melden A.I. Ed. Human Rights (Belmont CA: Wadsworth Co., 1970) p.76.

[2] ibid, p. 91

[3] ibid, p.93

[4] Wasserstrom, R. "Rights, Human Rights and Racial Discrimination" in Melden A.I. ed. Human Rights (Belmont CA: Wadsworth Co., 1970) p. 106.

[5] Dworkin, R. Taking Rights Seriously, (Cambridge Ma: Harvard University Press, 1977).

[6] ibid, p. 198

[7] ibid, p. 198

[8] ibid, p. 199

[9] ibid, p. 199

[10] ibid, p. 199

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A. Oriental Canadians*

*The discussion of Oriental Canadians is drawn in large part from Fragile Freedoms, Human Rights and Dissent in Canada, written by Justice Thomas R. Berger (Toronto: Clark, Irving & Co. Ltd.) 1981, chapter four "The Banished Canadians: Mackenzie King and the Japanese Canadians".

The experience of the Chinese and Japanese in Canada is a poignant example of how massive injustice can result when governments attempt to determine the scope of human rights and civil liberties simply by balancing or setting off individual rights against the demands of the public and the state's interest in social efficiency.

The deportations of Japanese Canadians to internment camps in British Columbia during World War II was not an isolated example of hostility to Orientals in Canada. The internment of the Japanese Canadians was merely a clear manifestation of a pre-existing and persistant spirit of racial intolerance in Canadian society.

The Chinese first arrived in Canada in 1858, and the Japanese in 1877, to work as cheap labour for British Columbia's logging and mining camps and railroad construction. Many of these young men remained in British Columbia so that by 1901, 10% of the province was Japanese.

The white population was apprehensive of the influx of Orientals into the province and efforts were soon made to curb Oriental immigration. Under the British North America Act the Federal Government had exclusive jurisdiction over immigration, so British Columbia could do nothing to stem the flow. In 1880 British Columbia convinced the Federal Government to impose a $50 head tax on Chinese immigrants. Sir John A. MacDonald wanted the Oriental immigrants to continue their work on the railroad, but frankly admitted that he would "be quite ready to join to a

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reasonable extent in preventing a permanent settlement in the country of Mongolian or Chinese immigrants". To achieve that end, in 1885 the Federal Government, by statute, denied Orientals the right to vote.

In 1896, the Liberals under Laurier came to power. British Columbia in 1900, 1903 and 1905, again tried to pass its own immigration laws, but the legislation was disallowed by the new Federal Government. Laurier recognized that naturalized Orientals should be given the right to vote and in 1898 they were legally enfranchised for federal elections. The Government of British Columbia intervened to prevent Orientals from exercising this new right. The British Columbia Legislature, in 1895, denied Orietnals the right to vote in provincial elections, and since the provincial list of voters was used to prepare the federal list, Orientals were effectively prevented from voting in federal elections as well. In 1902 the Privy Council in London (then Canada's final court of appeal) upheld the right of the British Columbia Legislature to deny the vote to Orientals. Finally, in 1920, Parliament passed an Act providing that persons disenfranchised by any province because of their racial origins would be disqualified from federal elections unless they were war veterans.

Discrimination against Orientals in British Columbia did not end with their disenfranchisement. British Columbian legislation prevented Orientals from seeking provincial or municipal employment. It was a condition of sales of Crown timber that Orientals not be employed, and by a variety of laws, regulations and customs, Orientals were effectively excluded from the professions.

Popular animosity against Orientals increased, culminating in mob violence in 1907, when white residents of Vancouver stormed through

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the Oriental quarter causing extensive property damage. This hostility was reinforced by both Federal and Provincial Government leaders. Mackenzie King, then federal Deputy Minister of Labour, urged that restrictions be placed on Japanese immigration. At the request of the Government of Canada, Japan agreed to limit the number of Japanese males emigrating to Canada, but would not agree to restrict the emigration of Japanese women. The result was a sharp increase in the number of Japanese women entering Canada, and within 20 years the Japanese population in British Columbia rose by 15,000.

The Federal Government also sought to restrict Japanese-Canadian economic expansion. By 1919 Japanese-Canadians held half the salmon gill-net licenses issued in the province. In that year the Federal Department of Marine and Fisheries promised to "gradually eliminate Orientals from the fishery", and as a result by 1925 half the licenses held by Japanese-Canadians had been cancelled. Between 1921 and 1930 Japanese-Canadian fishermen were barred from using gas powered boats on the Skeena River, and so were forced to row their boats while white fishermen motored by. By 1941, Japanese-Canadians held only 12% of the fishing licenses in British Columbia.

All of these measures were undertaken quite legally by the Provincial and Federal Governments. There was no constiutional barrier preventing either government from enacting legislation which discriminated against a particular racial group. The only limitation was whether the law in question was properly within Federal or Provincial jurisdiction.

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Undoubtedly, discrimination by governments arose from and reinforced racial intolerance among the citizens of British Columbia and Canada. Not even the churches preached tolerance. The Anglican Bishop of New Westminster told his synod "we should have a province that will be white; that will be British and that will be Christian".

Appeals by British Columbia to the Federal Government to ban further Oriental immigration continued. A. M. Manson, Attorney General of British Columbia said,"The Oriental is not possible as a permanent citizen in British Columbia because ethnologically they cannot assimilate with our Anglo-Saxon race". In 1927 British Columbia Premier John Oliver told Mackenzie King

> "The stopping of Oriental immigration entirely is urgently necessary, but that in itself will not suffice, since it leaves us with our present large Oriental population and their prolific birth rate. Our government feels that the Dominion Government should go further, and by deportation or other legitimate means, seek to bring about the reduction and final elimination of this menace to the well being of the white population of this province.

In May 1928, King negotiated with Japan to limit the number of emigrants to Canada to 150 persons per year.

Prior to 1948, The Co-operative Commonwealth Federation (CCF) was the only political party to urge giving Orientals the vote. In 1933 the party platform of the CCF, the Regina Manifesto urged "equal treatment before the law of all residents of Canada, irrespective of race, nationality or religious or political beliefs". Indeed, the Liberal party used the issue to attack the CCF, by running newspaper ads which read, "A vote for any CCF candidate is a vote to give the Chinamen and the Japanese the same voting right as you have". The

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National Conservative party in 1938 passed a resolution in favour of the complete exclusion of all Orientals from Canada. Trade unions also came to the assistance of Oriental Canadians. In 1931 the Trades and Labour Congress of British Columbia passed a motion calling for the enfranchisement of all native-born Canadians.

With the advent of the Second World War, governmental action against the Japanese increased. On September 10, 1939, Canada declared war on Germany. Many Canadian born Japanese tried to enlist, and some who signed up east of the Rockies were accepted, but in British Columbia there was de facto exclusion. On January 8, 1941 Mackenzie announced that all Canadian citizens of Japanese ancestry were to be exempted from military service. Canadians of German or Italian ancestry were not exempted. In Justice Berger's view, exemption from military service for Japanese Canadians was designed to forestall any claim they might later make to a right to vote based on military service. This decision was a concession to the then Premier of British Columbia, Duff Pattullo, who wrote Mackenzie King saying, "If they (Canadian born Japanese) are called up for service, there will be a demand they be given the franchise, which we in the province will never tolerate...".

Throughout 1941, members of Parliament from British Columbia urged Parliament to take drastic measures against Japanese Canadians. Only one member of Parliament, Angus MacInnis of the CCF, spoke in defence of Japanese Canadians. On February 28, 1941 MacInnis addressed the House of Commons saying:

> If we are to avoid the troubles that other countries have had with racial minorities, then we must take a realistic view of the situation in British Columbia and attempt to make these people feel at home among us. We will secure their loyalty by fairness and kindness and by the practice of those other attributes which we exercise in our relations with other people.

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On December 7, 1941, the Japanese attacked Pearl Harbour. Immediately 38 Japanese Canadians were interned and 1200 Japanese Canadian fishing boats were impounded. The Japanese were finally removed from the fishing industry in British Columbia. On December 7, 1941 all German, Italian and Japanese immigrants who retained their original citizenship were required to register with the Registrar of Enemy Aliens. But on December 16, all persons of Japanese descent, whether Canadian citizens or not, were required to register. No such requirement was made of Canadian citizens of German or Italian ancestry. On January 14, 1942, in response to public pressure, King announced that Japanese nationals between the ages of 18 and 45 were to be interned in road camps in the interior of the province.

Nonetheless, militants in and out of government continued to demand the complete evacuation of all Japanese-Canadians from the west coast. On February 26, 1942, King gave in to public pressure and ordered all persons of Japanese ancestry to be evacuated from the west coast (except if they had married a white person). Their property was confiscated by the Custodian of Enemy Property, and any who resisted were sent to a concentration camp at Angler, Ontario. The Japanese-Canadians (many of whom were Canadian born) were collected in the Pacific National Exhitibion grounds in Vancouver where they were housed in converted livestock pens. In the late spring of 1942, they were evacuated to mining towns and newly built shack towns in the British Columbia interior, and in Alberta.

By June 6, 1942 (Battle of Midway) it became clear that Japan could not win the war. Members of Parliament insisted that the

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Japanese-Canadians not be allowed to return to the west coast, and in fact, they urged that all Japanese-Canadians be repatriated to Japan. Again, only Angus MacInnis spoke in their defence; MacInnis said to the House

> Canada is at war with Japan. Canada is also at war with Germany and Italy. I see no reason why we should deal with the population of Japanese origin among us any differently from the way in which we deal with those of German and Italian extraction. If we deal with them differently--and we have done so--we do it on account of racial prejudice...it would not be repatriation in the proper sense; it would be deportation or exile for these people.

King again capitulated to public opinion and forced the Japanese-Canadians already in internment camps to choose between relocating east of the rockies or "repatriation" to Japan. By July 1944, 4,000 had already relocated east of the rockies and over 10,000 (3/4 of whom were Canadian citizens and 1/2 Canadian born) agreed to repatriation.

In the same year, by order in council under the War Measures Act, King's government had Parliament pass a bill preventing Japanese-Canadians who relocated east of the rockies from voting in Federal elections. All of these actions were upheld in the Supreme Court of Canada and the Privy Council in London.

Soon after the war, new ideas of human rights and freedoms were gaining currency. Many people began to protest against forced repatriation. Once more Mackenzie King responded to public pressure and the deportation program was cancelled but only after 4,000 Japanese had already left for Japan. Japanese-Canadians still could not return to the west coast, and as late as 1948 they could not travel freely in British Columbia nor could they fish commercially anywhere in Canada.

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On June 15, 1948 Parliament granted to Japanese-Canadian citizens the right to vote in federal elections. In 1949, the Japanese were allowed to return to the west coast.

As has been shown, Japanese and Chinese residents in Canada were subjected to blatant and abusive racial discrimination by all levels of government. Gross violations of the human rights of Oriental Canadians resulted when governments balanced the rights of Orientals against the demands of the public and the social efficiency of deportation. Despite that, all the governmental measures taken against them were legal, primarily by operation of the doctrine of legislative supremacy. Within Canada's federal system, legislative supremacy meant that a legislature had an unfettered ability to legislate on a given subject matter, so long as the subject matter was properly within its jurisdiction. This doctrine clearly operated to the disadvantage of Orientals in Canada. Oriental Canadians had no safeguards against discriminatory legislation and in fact their fate in Canadian society was often determined by the wishes of a hostile majority as governments seemed singularly incapable of resisting the influence of racist sentiment.

B. Native Peoples

The rights of native people in Canada have also been compromised by the desire of the white majority to occupy Indian lands and open those lands to settlement.

European explorers did not establish permanent and successful settlements in North America until the early 1600's. In 1608 Samuel de Champlain founded Quebec. The French did not have a specific

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policy regarding the Indian population of New France. By and large the French viewed the Indians simply as suppliers of furs and animal pelts. The French assumed that when the Indians assented to French rule, the ownership (title) of Indian lands would pass to the French monarch. Treaties were made between the French and the Indians to formalize Indian consent to French rule. These treaties did not specifically transfer the title (ownership) to Indian lands in Franch to the French.

The English in North America had a very different Indian policy. The earliest English settlements were established along the northeastern coast of the United States (New England). The English recognized from the beginning that native people possessed a form of legal ownership in their lands because they had possession of the land prior to the arrival of European settlers. In other words, the British realized that the Indians possessed certain "aboriginal" rights to the land they occupied. Therefore Britain required its English Governors in North America to purchase land from the Indians before opening such lands to settlement. Control over Indian affairs was left to the individual colonies in New England, and consequently there was little control over fraudulent dealings with Indians. The policy of purchase prior to settlement was often ignored, and native people in New England soon began to resent the westward expansion of English settlements.

To create a uniform Indian policy, Britain (c. 1750) instructed its colonial Governors that no Indian lands could be purchased by private individuals, and that the Crown (local colonial Government) had sole authority to purchase Indian lands.

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In 1760, New France was conquered by the British and Quebec was formally ceded to Britain in 1763. Up until that time, the British had had poor and often violent relations with the Indians. In 1763 Britain issued a Royal Proclamation on Indian policy. The Royal Proclamation stated that all lands outside of the colony of Quebec and west of the New England colonies were reserved for the Indians as their hunting grounds. The Proclamation forbade white settlement in lands reserved for the Indians, unless the Indians chose to sell the land to the Crown. The American colonies largely ignored the Royal Proclamation and white expansion continued westward.

The Royal Proclamation of 1763, which continues to have the force of a statute in Canada, and the British Indian policy which preceeded it, involved an explicit recognition of the "aboriginal rights" of native people. To open occupied Indian lands for white settlement, it was necessary for colonial Governments to make treaties with the Indians by which they would turn over their lands to the Government.

Following the American Revolution, 100,000 United Empire Loyalists emigrated to British North America (the loyal English colonies of Eastern and Atlantic Canada). A large number settled in Upper Canada (southern Ontario). Enormous pressure was exerted on the British Colonial Government to settle the Indian lands outside Quebec. Between 1780 and 1840, native people ceded their aboriginal rights to much of the land in Upper Canada, by entering a series of treaties and "surrenders" with the Colonial Government. As white settlement in Canada increased, more and more Indian land was ceded by treaty, and this became the pattern by which the Canadian Government opened the country to settlement. Between 1871 and 1923 the Canadian

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Government negotiated eleven land cession treaties with native people, opening for settlement almost all of northern Ontario, Manitoba, Saskatchewan, Alberta and parts of British Columbia, the Northwest Territories and the Yukon.

In practise however, the "treaty" policy did not result in fair and equitable negotiations between the Government and the native peoples. Often, Indian people had no choice but to negotiate the surrender of their lands when the Government indicated to them that white settlement would occur whether or not a formal treaty was made. Also, the compensation which native people received for the surrender of vast tracts of lands appears today to be ridiculously small. For example, in talks concerning Treaty No. 1, the Indians of Manitoba wished to retain approximately 2/3 of that province as reserve lands. In the end, Treaty No. 1 allotted 160 acres per family of five, an initial payment of $3.00 per person and a yearly annuity of $15.00 per family. The monetary consideration varied among the eleven treaties, but in no case did it exceed $12.00 per person (except for Chiefs and Headmen who received slightly more).

Similarly, the Federal Government recognized that the Metis had special land claims. After the Red River Rebellion of 1869, the Manitoba Act (1870) and the Dominion Lands Act (1879) sought to extinguish Metis land claims by allotting grants of land to Metis called "scrip". Scrip was a land grant composed of 320 acres or $320 cash, given to a designated Metis person. The Metis were given the option of acquiring scrip or treaty rights. If a Metis chose treaty rights then he was considered an Indian and entitled to treaty benefits. The Metis had to choose between treaty or scrip and were

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not allowed to refuse both and retain the lands they traditionally possessed. On occasion, unscrupulous land speculators purchased the "scrip" of a Metis person for an insignificant amount and transferred the title to themselves. The Metis, many of whom were illiterate, were particularly vulnerable to exploitation by speculators.

Apart from the grossly inadequate compensation given to native people for the surrender of their land, many issues arising from land treaties remain unresolved, such as concerns over hunting and fishing rights, mineral rights and revenues from natural resources on the reserves, and Indian self-government. Perhaps Part II, s. 35 of the Canadian Charter of Rights and Freedoms will help to inaugurate a period of fair dealing between Canadian society and the native peoples. S. 35 of the Charter reads:

> (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.

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V. HISTORY OF CIVIL LIBERTIES IN CANADA*

*The discussion of the history of civil liberties in Canada is drawn in large part from Chapter 24, Constitutional Law of Canada (Toronto, Carswell Co.) 1977, written by Professor P. W. Hogg.

A. Introduction

Civil Liberties can be divided into four groups,

- Political Liberties - consisting of freedom of speech, religion and assembly.
- Egalitarian Liberties - consisting of the claim to equality of access to education, employment, accommodation and other benefits, and implies at least the absence of racial, sexual or other illegitimate criteria of discrimination. These liberties often conflict with economic liberties.
- Legal Liberties - consisting of freedom from arrest, search, seizure of property, imprisonment, self-incrimination and unfair adjudication.
- Economic Liberties - consisting of freedom of private property and contract.

All of these civil liberties compete with other legal values and indeed sometimes compete with each other. For example, freedom of speech often competes with laws regulating libel, slander or sedition. Freedom of assembly conflicts with laws punishing loitering or rioting. Freedom from arrest, search and seizure may appear at times to interfere with the efficiency of police investigations.

Economic liberties, the freedom to enter or not to enter contractual or business relations with individuals or groups of individuals, sometimes conflict with the right not to be discriminated for illegitimate reasons, eg. on the basis of race, sex, religious belief, etc.

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The protection of civil liberties therefore consists of compromises that society makes between competing legal and social values.

B. Civil Liberties Under the Common Law

The political liberties of belief and expression did not derive from positive law (i.e. law actually and specifically enacted or adopted by proper authority) or governmental action; they derived from the absence of positive law or governmental action. Laws against defamation, sedition, hate propoganda, obscenity, etc. were positive laws which limited what one could say. Those forms of speech or expression which the law did not specifically regulate or forbid were therefore legal and comprised the civil liberty of speech. The doctrine of legislative supremacy (that a legislature had an unfettered ability to pass laws on any subject), meant that this residue of individual liberty had no constitutional protection. Speech was allowed insofar as the government did not forbid it.

When the American colonies declared and won their independence from the United Kingdom, they added various guarantees of civil liberties to their new constitution. This collection of civil libertarian guarantees came to be known as a Bill of Rights, and the Bill of Rights could not be changed by ordinary legislation, but only by constitutional amendment. This was a significant departure from the British tradition, because it meant that ordinary legislation could be struck down by the courts if it infringed the civil liberties contained in the American Bill of Rights. The United States had therefore removed the doctrine of legislative supremacy from its democratic political system.

Until the recent enactment of the Canadian Charter of Rights and Freedoms, Canada had no direct constitutional safeguard for civil liberties.

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Nonetheless, in the absence of specific constitutional protection, three factors helped to establish and protect civil liberties in Canada, and continue to do so today,

1. Canadian Democracy - the democratic character of Canada's political institutions, its traditions of free elections, opposition parties and free press, allowed public opinion and protest to influence not only the composition of government but also its policies and decisions.
2. The Independence of the Judiciary - the judiciary provided an impartial forum for the free exercise of citizens rights. The independence of the judiciary is today secured not only by the Constitution Act but also by a long political tradition dating to the beginning of the 18th century in Britain.
3. The Common Law - Traditionally the common law tended to favour individual rights and freedoms when they came into conflict with state interests. At common law the definitions of crime were construed strictly in favour of the defendent; the Crown had a heavier burden of proof than the accused, confessions were inadmissable unless they have been freely obtained, the accused could not be compelled to testify and if he did he could not be compelled to incriminate himself.

Outside the criminal sphere the individual and the state often came into conflict over the exercise of governmental power. The early development of the common law doctrine that the king and government were bound by the rule of law and that every official act had to be justified by law, almost always meant that state actions infringing the liberty of a subject required the authority of a statute. Out of this

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developed the rule that if a government official acts outside his statutory authority he enjoys no more power than a private individual (for example, he may be sued or become criminally liable).

Yet, because of the doctrine of legislative supremacy, if a statute plainly took away a civil liberty, or authorized someone to infringe a civil liberty, then the courts could provide no protection. Nonetheless, the courts construed such statutes strictly. For example, if a statute conferred a discretion on an official to act as he/she thought fit, the courts insisted that such discretion be exercized in good faith.

C. Civil Liberties Under the British North America Act

1. Introduction

The British North America Act did not include constitutional guarantees for civil liberties as the American constitution had done. Instead, the BNA Act concerned itself with the distribution of legislative powers between the Federal and Provincial Governments. The doctrine of legislative supremacy was retained.

There were, however, some limited exceptions: s. 93 guaranteed the rights and privileges of denominational schools; s. 99 guaranteed the tenure of superior court judges; s. 133 guaranteed the use of English and French in legislative and judicial proceedings in Quebec and Federal jurisdiction; s. 20 required annual sessions of Parliament; ss. 50, 91(1) limited Parliament to five year terms; and ss. 51, 51A, and 52 guaranteed representation by population.

2. Distribution of Powers

The B.N.A. Act assigned exclusive spheres of jurisdiction to the Federal and Provincial Governments (with, of course, some incidental overlap). So for example, the Federal Government received jurisdiction over the criminal law, interprovincial trade and commerce, banking, naturalization of aliens, etc. and the provinces received jurisdiction over the administration of justice within the province, property and civil rights (civil rights meaning rights concerning civil law; eg. contractual rights, commercial law, landlord-tenant law, and others; this is not to be confused with civil liberties).

Since civil liberties were not specifically protected under the B.N.A. Act, the constitutional validity of a given law did not depend on how the legislation affected civil liberties. Rather, constitutionality was achieved if the law could be classified under a proper category of legislative jurisdiction. By raising these impediments to legislative action the B.N.A. Act, on occasion, indirectly safeguarded civil liberties. However, the impact of a law on civil liberties was only of incidental concern. This is explained in greater detail below.

a) Political Liberties

Jurisdiction over the political liberties of speech and religion was divided between the Federal and Provincial Governments. Crimes of sedition and obscenity limited free speech and were within Federal jurisdiction under the criminal law power. The tort of defamation (libel and slander) also limited free speech, but was within Provincial jurisdiction due to the provinces' authority over property

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and civil rights within the province. In these two examples the ruling feature was whether the law was criminal or tortious in nature; its impact on freedom of speech was merely incidental and in itself did not determine legal validity.

A series of cases decided by the Supreme Court of Canada generated the idea that "speech" and "religion" may constitute matters of exclusive Federal jurisdiction because both of these freedoms were so essential to the healthy functioning of a national democratic society that they could not realistically be said to be solely of a provincial concern. Though this idea gained some prominence especially in the 1950's, it never became an entrenched view of a majority of the judges of the Supreme Court, so that by and large freedom of speech and religion continued to be regarded as largely ancillary to the validity (constituionality) of legislation.

b) Egalitarian Liberties

The principle of legislative supremacy and the absence of any guarantee of equal protection in the B.N.A. Act allowed either Parliament or a Legislature to enact discriminatory legislation. Occasionally, the division of powers did result in discriminatory legislation being struck down. A British Columbia law prohibiting the employment of Chinese labourers in the mines of the province was struck down because the essence of the law was an imposition of a disability on aliens and naturalized subjects over which the Federal

Government had jurisdiction. However, what one level of government could not enact the other one could, so it merely became a question of which government (Federal or Provincial) was competent to pass the legislation.

Insofar as legislation preventing discrimination was concerned (eg. provincial human rights acts), that jurisdiction generally fell to the provinces because of their jurisdiction over property and civil rights, enabling them to regulate employment, rental and business practices. A Federal Human Rights Code was also developed for Federal Government Departments.

c) Legal Liberties

The power to enact laws authorizing or regulating arrest, search, seizure, imprisonment and adjudication, belonged either to Parliament or the Provincial Legislatures, depending on the purpose of the law. If the law was primarily in relation to criminal law or procedure, it was properly a federal matter, but if the law was mainly concerned with the administration of justice generally, it was of provincial concern. The impact of laws on civil liberties was of little relevance in assigning jurisdiction, each Legislature being supreme within its own sphere.

d) Economic Liberties

Legislative power to curtail or enlarge "economic liberties" depended on the purpose of the law and not on its impact on civil liberties. Laws governing the use of property, labour

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relations and "civil" rights in the province were within provincial jurisdiction under s. 92(13) of the BNA Act. The Federal Government retained jurisdiction over interprovincial and trade and commerce, banking, bankruptcy and business activity within the purview of the criminal law.

3. The Implied Bill of Rights

Some judges and lawyers continued to believe that there were some fundamental liberties that should be safeguarded from legislative encroachment. They looked to the preamble of the BNA Act, which referred to "a constitution similar in principle to that of the United Kingdom", and reasoned that the authors of the preamble would not have contemplated a significant abrogation of free speech, as it has had a long tradition in British law and was in fact "the breath of parliamentary traditions".

This view never received support by a majority of judges on the Supreme Court, in part because it came into conflict with the strong parliamentary tradition of legislative supremacy. Finally, the Implied Bill of Rights theory was specifically rejected by the Supreme Court of Canada in Attorney General of Canada and Dupond v. Montreal.

D. Civil Liberties and the Canadian Bill of Rights

1. Introduction

After the Second World War a greater concern for human rights arose in Canada and in other countries. In 1948 the Universal Declaration of Human Rights was adopted by the United Nations. Bills of Rights became common additions to the constitutions of many developing nations who were attaining their independence after World War II. John Diefenbaker, who in the 1950's had

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been a vocal defender of human rights in the House of Commons, secured the enactment of the Canadian Bill of Rights in 1960, and his commitment to enacting the Bill of Rights was in large part a response to the plight of the Jehovah's Witnesses in Canada.

2. Jehovah's Witnesses in Canada*

*The discussion of the Jehovah's Witnesses isdrawn in large part from Fragile Freedoms, Human Rights and Dissent in Canada, written by Justice Thomas R. Berger (Toronto: Clark, Irwin & Co. Ltd.), 1981, chapter six, "Jehovah's Witensses: Church, State and Religious Dissent".

The Jehovah's Witnesses were a small Christian sect which spread to Canada from the United States in the late nineteenth century. Many of their religious beliefs set the Witnesses at odds with secular governments and other religious groups. The Witnesses of Jehovah believe their first loyalty is to God and therefore do not consider themselves bound by earthly laws if they conflict with their understanding of the law of God, which for them is discernable through a strict interpretation of the Bible. Jehovah's Witnesses oppose participation in politics or in the military service and the observance of national holidays; they will not stand at attention for national anthems and they refuse blood transfusions even for their children, whereupon medical authorities obtain court injunctions to administer the transfusions.

The persecution of the Jehovah's Witnesses in Canada began during the First World War when the Federal Government introduced military conscription. As conscientious objectors, the Jehovah's

Witnesses resisted conscription. The Federal Government did not believe the Witnesses were a true religious denomination and so they were forced to choose military service or prison. Many Witnesses chose prison, and in doing so criticized clergymen who supported the war, as well as governments and other Christian denominations which they perceived to be corrupt.

In 1914 the Federal Government passed the War Measures Act. That Act gave the Federal Cabinet wide powers to unilaterally curtail the civil liberties of Canadians. In addition to the War, the Russian Revolution of 1917 had alarmed many western governments. Measures initially adopted to curtail the activities of communists were used with equal zeal against the Jehovah's Witnesses. In January, 1918, the Federal Cabinet issued an Order in Council banning a Witness publication, "The Bible Student's Monthly", on the grounds that it was likely to discourage enlistment. By July of that year the Federal Government banned all of the Witnesses' publications. The existing literature was seized and many Witnesses were imprisoned. The ban on Witness publications continued until January 1, 1920.

During the 1920's the Witnesses began to proselytize on the radio, and to do so purchased five radio stations across Canada. The Federal Department of Marine and Fisheries (which at that time was responsible for licensing radio stations) cancelled all the Witnesses' broadcasting licenses without a hearing. In March, 1928, Lucien Cardin (Minister of Marine and Fisheries) refused to renew the licenses of Witness stations in Vancouver,

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Edmonton and Toronto, whereupon the Witnesses presented the government with a petition signed by 458,026 people to have the licenses renewed. The government refused. Nonetheless, the Witnesses continued to broadcast their criticism of the state and the Catholic and Protestant churches by purchasing air time on local radio stations.

In 1932, the Conservative government of R. B. Bennett established the Canadian Radio Commission, which took over the licensing of radio stations. On January 18, 1933 the Commission sent a directive to radio stations throughout Canada that the speeches of Judge Rutherford (a Jehovah's Witness spokesperson) should not be broadcast without prior approval by the Commission. The Witnesses sent another petition to Ottawa signed by 406,270 people, but they remained off the air.

It was in Quebec however, that the Jehovah's Witnesses were to encounter the most intense governmental opposition. Several landmark judicial decisions in the area of civil liberties in Canada arose out of the conflict between the Jehovah's Witnesses and the Duplessis government in Quebec.

The Witnesses began to seek converts in Quebec in 1933. Their pamphlets were anti-clerical and anti-Catholic, which roused the anger of many in government and the Church. Witnesses were charged with a variety of offences such as violating the Lord's Day Act, disturbing the peace, peddling without a license, as well as more serious offences such as sedition. Though many Witnesses were convicted, fined and imprisoned, they continued to seek converts. When Maurice Duplessis came to power in Quebec

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in 1936, he promoted the campaign against the Jehovah's Witnesses not only through existing laws, but also through his new Padlock Act, which though originally intended to limit the propogation of communism, was broad enough to effectively prohibit the free expression of Witness doctrine.

Duplessis was defeate in 1939, but in that year Parliament reinvoked the War Measures Act. In 1940 the Federal Government banned the Canadian Watch Tower Bible and Tract Society which arranged for the printing of the Witness literature and which owned Witness meeting halls. It became an offence to belong to the Society and all the orgnaization's property was placed under the control of the Custodian of Enemy Property. Witness literature was seized and their meeting halls were closed, and during the war years 500 of the 7,007 Witnesses in Canada were arrested. This governmental action was taken in large part because the Jehovah's Witnesses vocally opposed the war. John Diefenbaker, a defender of the Witnesses during the war wrote in his memoirs, "the treatment of the Jehovah's Witnesses during the war can never be justified". On June 13, 1944 the Federal Government lifted the ban on the Watch Tower Society after it was presented with another petition containing 223,448 names.

After the war, the Witnesses were once again free to proselytize and they returned to the streets of Quebec. Their literature contained bitter criticism of the influence of the Catholic Church on the social life of Quebec, and the Church retaliated by denouncing the Witnesses as communists and heretics.

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Once again, the existing laws were harshly administered against the Jehovah's Witnesses. Homes were entered without warrants, meetings broken up, Bibles seized, and hundreds of Witnesses were charged with sedition. By 1946, 800 Witnesses were facing trial in Quebec.

In November of that year, the Witnesses distributed a virulently anti-Catholic pamphlet entitled "Quebec's burning hate for God and Christ and freedom is the shame of all Canada". As a result, many more Witnesses were arrested, often for distributing literature without a license, but more serious charges were also laid.

Aimé Boucher, a farmer who helped distribute "Quebec's burning hate" was charged with sedition. The Criminal Code states that it is seditious to publish or to circulate any document that advocates the use of force as a means of accomplishing a change in government. Though creating discontent or feelings of hatred or ill-will among citizens may be indicative of seditious intent, the Criminal Code itself indicated that it is not sedition to point out errors or defects in the law or in government, with a view to changing them. This qualification on the definition of sedition formed the basis of Boucher's defence. The trial judge did not tell the jury that they could decide for themselves whether Boucher acted in good faith, and he virtually directed the jury to convict Boucher, which they did. The Quebec Court of Appeal denied Boucher's appeal. Boucher then appealed to the Supreme Court of Canada.

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The Supreme Court, speaking through Justice Rand, held that merely tending to create discontent or disaffection or ill-will among the population was not enough to make the pamphlet seditious. There must in addition be an intention to incite the people to violence. Justice Rand wrote,

> Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality...
>
> Similarly in discontent, disaffection and hostility: as subjective incidents of controversy, they and the ideas which arouse them are part of our living which ultimately serve us in stimulation, in the clarification of thought and, as we believe, in the search of the constitution and truth of things generally.

The Supreme Court decided that Boucher had been denied a fair trial because the trial judge had not adequately summed up the law for the jury. Rather than order a retrial, the court held that the Witnesses had acted in good faith and so ordered that Boucher be acquitted.

Despite Boucher's acquittal, the government of Quebec continued to harass the Witnesses by the use of licensing by-laws. The province delegated to municipalities the power to pass by-laws that prohibited distribution of literature in the streets without a license. Quebec City passed such a by-law, forbidding the distribution of literature in the streets without the permission of the City's Chief of Police.

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A Jehovah's Witness named Laurier Saumur challenged the constitutionality of the by-law in the courts arguing that the Provincial Government had no authority to delegate to municipalities the power to enact such by-laws because the by-law infringed freedom of religious expression which ought to be considered a federal matter. The Quebec courts rejected the argument presented by Saumur, so in the fall of 1953 the Witnesses once again appealed to the Supreme Court of Canada and the majority of Supreme Court judges decided in Saumur's favour, holding that the by-laws were unconstitutional.

The experience of the Jehovah's Witnesses in Quebec illustrates how discrimination and injustice can result not only from the enactment of unjust laws, but also through an unfair and biased administration of the law. A poignant example of this is the case of Roncarelli v. Duplessis.

Frank Roncarelli, a Jehovah's Witness and restauranteur, had posted bail for hundreds of his fellow Witnesses. On December 4, 1946, Maurice Duplessis, Premier and Attorney General of Quebec, had the Quebec Liquor Commission cancel Roncarelli's liquor license and "forever" disqualify Roncarelli from holding a license to sell liquor. Duplessis justified this action by saying,

> The sympathy which this man (Roncarelli) has shown for the Witnesses in such an evident repeated and audacious manner is a provocation to public order, to the administration of justice and is definitely contrary to the aims of justice.

Roncarelli claimed the cancellation of his liquor license was illegal and sued Duplessis for damages. The Superior Court of

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Quebec awarded Roncarelli $25,000 damages but that decision was reversed by the Quebec Court of Appeal. Roncarelli appealed to the Supreme Court of Canada.

At the Supreme Court, Duplessis argued that the Quebec Liquor Commission had the authority to cancel liquor licenses and that he had merely urged the Commission to exercise its legal authority. The majority of judges, again speaking through Chief Justice Rand, rejected that argument. Rand stated,

> In public regulation of this sort there is no such thing as absolute and untrammelled discretion.... 'Discretion' necessarily implies good faith in discharging public duty; there is always a perspective within which a statute is intended to operate; and any clear departure from its lines or objects is just as objectionable as fraud or corruption... To deny or revoke a permit because a citizen exercises an unchallengeable right (the provision of bail) totally irrelevant to the sale of liquor in a restaurant is equally beyond the scope of discretion conferred.

There was nothing improper or illegal about supplying bail for 100 persons as opposed to one. The Supreme Court noted that the cancellation of Roncarelli's liquor license was merely an attempt to inflict financial injury. Chief Justice Rand stated that the actions of the Quebec Liquor Commission and Premier Duplessis were "a gross abuse of legal power expressly intended to punish him for an act wholly irrelevant to the statute", and the Supreme Court reinstated the trial judge's damages award.

Throughout these years of confrontation with government, the Witnesses continued to petition Parliament to enact a Bill of Rights to advance the protection of fundamental freedoms in Canada. The existence of the Canadian Bill of Rights is due in large part to their efforts.

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3. The Canadian Bill of Rights

The Bill of Rights by its formulation and judicial interpretation offered quite limited protection of civil liberties.

a) The Structure and Wording of the Bill of Rights

The Bill of Rights was an Act of Parliament and as such only applied to federal legislation. It did not per se form part of Canada's constitution and therefore could be repealed at any time by Parliament. Furthermore, Parliament could make legislation immune from the Bill of Rights by operation of the "notwithstanding" clause in s. 2 of the Bill of Rights. S. 2 stated:

> Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared, and, inparticular, no law of Canada shall be construed or applied so as to...

The wording of s. 2 created some confusion as to the effect of the Bill of Rights on Federal legislation. Did it merely provide a guide to interpreting federal statutes or could the Bill of Rights render Federal legislation ineffective if the legislation conflicted with it?

Some early legal opinion took the view that s. 2 merely provided a rule of interpretation, namely that the courts would simply construe each statute so as to avoid, as far as possible, any conflict with the Bill of Rights. If a statute plainly infringed the Bill of Rights so that the conflict

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could not be avoided by interpretation, then the effect of s. 2 would be exhausted and the statute would have to be applied despite its conflict with the Bill of Rights.

This interpretation of s. 2 was rejected in R. v. Drybones (1969). The issue in that case was whether section 94(b) of the Indian Act was in conflict with the Bill of Rights, and if it was, whether section 94(b) was rendered inoperative. S. 94(b) made it an offence for "an Indian" to be intoxicated anywhere off a reserve. The Supreme Court of Canada held that s. 94(b) of the Indian Act was inconsistent with s. 1(b) of the Bill of Rights because "an individual is denied equality before the law...if it is made an offence...on account of race, for him to do something which his fellow Canadians are free to do...". The Court also held that the courts should first "construe" a statute to avoid as far as possible any conflict with the Bill of Rights, but if the conflict cannot be avoided by interpretation then the courts should hold the statute to be inoperative. In Drybones the court held that s. 94(b) of the Indian Act was inoperative.

Drybones was the only decision in which the Supreme Court used the Bill of Rights to render legislation inoperative. During the 1970's the Bill of Rights proved to be a weak tool in the defence of human rights.

b) Effect of the Bill of Rights on Earlier Statutes

The Bill of Rights was merely an Act of Parliament and therefore had no greater constitutional status than any other

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Federal legislation. Generally when two laws of the same legislative body conflict, the common law rule of implied repeal applies; the later is deemed to have impliedly repealed the earlier to the extent of inconsistency. Therefore there was little constitutional difficulty in holding the Bill of Rights rendered earlier statutes inoperative.

c) Effect on Later Statutes

A difficult constitutional problem arose as to the effect of the Bill of Rights on later statutes. On the one hand the doctrine of implied repeal suggested that statutes passed after the Bill of Rights had precedence to the extent of inconsistency. On the other hand, s. 2 of the Bill of Rights seemed to apply to past and future laws enacted by the Federal Parliament. Once again the doctrine of legislative supremacy operated, suggesting that precisely because a legislature is the supreme law making body, an earlier legislature could not fetter a later legislature's ability to pass laws. On this basis, the Bill of Rights, although effective in rendering earlier inconsistent statutes inoperative, could not be anything more than a rule of interpretation with respect to later inconsistent statutes; that is, statutes passed after 1960.

As can be seen above, the form of the Bill of Rights (that is, its lack of constitutional preeminence compared with other legislation) seriously impaired its ability to safeguard human rights in Canada.

4. Judicial Interpretation of the Contents of the Bill of Rights

a) Political Civil Liberties

Only one case dealt with the impact of the Bill of Rights on political liberties. In Robertson and Rosetanni v. The Queen (1963) the Supreme Court held that the Lord's Day Act prescribing Sunday as a day of rest, did not violate the guarantee of "freedom of religion" (s. 1(c)). Other persons whose day of observance was other than Sunday were merely inconvenienced financially, which in the opinion of the Supreme Court, did not per se abridge religious freedom.

b) Egalitarian Civil Liberties

The first important equal protection case to be litigated was Regina v. Gonzales (1962). The issue in that case was s. 95(a) (formerly s. 94(b)) of the Indian Act which made it an offence for Indians to be intoxicated off a reserve. The British Columbia Court of Appeal upheld s. 94(b) as valid law not infringing "equality before the law" by adopting the "separate but equal" reasoning from previous American cases. In other words, the Court of Appeal held that "equality before the law" simply meant that all members of a particular class must be treated in the same way. This reasoning was specifically rejected by the Supreme Court in R v. Drybones (1972), where s. 95(a) of the Indian Act (formerly s. 94(b)) was held inoperative because it resulted in inequality before the law.

The Supreme Court soon retreated from that position to the extent that R v. Drybones (1972) remained the sole case

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in which a law was held inoperative for conflict with the Bill of Rights. The retreat began with the case of R v. Lavell (1973). In that case the Supreme Court upheld the provisions of the Indian Act which discriminated on the basis of sex by providing that an Indian woman who married a white man lost her Indian status, while an Indian man who married a white woman did not. The Supreme Court decided that equality before the law only meant "equality in the administration or application of the law". Equality before the law only gave an individual the right to have existing laws enforced equally according to race, national origin, colour, religion or sex. The content of the law could retain inequality. This remained the definitive case on equality before the law despite the fact that it is extremely difficult to reconcile with R v. Drybones.

In later cases, the Supreme Court developed the notion that "equality before the law" merely directed the court on an inquiry into whether a particular classification was a reasonable means of securing a legitimate legislative purpose. It then became very easy to argue that there was some redeeming quality to any challenged legislation, even though it may incidentally discriminate against a particular group.

c) Legal Civil Liberties

The Supreme Court was very cautious in extending the Bill of Rights into the area of legal liberties. Two cases illustrate this point: In Brownbridge v. The Queen (1972), the Supreme Court decided that a refusal to allow an accused person to consult counsel before taking a compulsory breathalyzer test is a

violation of the right to counsel. Three years later in Hogan v. The Queen (1975), the Supreme Court held that breathalyzer evidence obtained in violation of the right to counsel was nevertheless admissable.

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VI. THE DEVELOPMENT OF ANTI-DISCRIMINATION LEGISLATION AND THE ESTABLISHMENT OF HUMAN RIGHTS COMMISSIONS

Human rights, sometimes called the egalitarian civil liberties, proclaim that everyone has a right to equality of treatment, and that discrimination on the basis of race, nationality, sex, etc. is illegitimate.

We have already seen that so long as there were no constitutional impediments in the BNA Act preventing the enactment of discriminatory legislation, governments were by and large free to pass laws which discriminated against certain classes of people.

Similarly, in the absence of specific legislation forbidding discrimination, employers, landlords and business people were free to discriminate as well. The case of Christie v. York Corporation is illustrative. Christie, a black man, was denied service by a waiter because, as the waiter put it, he was "not to serve coloured people". Christie complained to the manager of the tavern but the manager reaffirmed the discriminatory policy of the tavern. Christie appealed to the courts.

In 1939 the Supreme Court of Canada decided that Christie had no legal recourse; discrimination for whatever reason was allowable, so long as no specific law forbade it. Justice Rinfret, speaking for the majority of the Supreme Court said:

> Any merchant is free to deal as he may choose with any individual member of the public. It is not a question of motives or reasons for deciding to deal or not to deal; he is free to do either. The only restriction to this general principle would be the existence of a specific law...

The egalitarian civil liberties were therefore on an entirely different footing than the political civil liberties (fundamental freedoms) of speech, association, religion, assembly and the press. The political civil liberties existed insofar as specific statutes did not limit them. The egalitarian civil liberties depended upon statutory enactments for their existence.

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It was not until the close of World War II that human rights legislation began to be developed in Canada. In 1944, Ontario enacted the Racial Discrimination Act prohibiting the expression of racial or religious discrimination in publications or displays. The Saskatchewan Bill of Rights Act of 1947 was however, the first relatively comprehensive human rights act in Canada. The Saskatchewan Bill of Rights reaffirmed the political civil liberties of speech, association, religion, assembly and the press, and in addition prohibited discrimination with respect to accommodation, occupation, education and business and land transactions on the basis of race, creed, religion, colour or ethnic or national origin. Under the Act, complaints of discrimination were adjudicated by a court, and the penalties ranged between $25.00 and $200.00, or a jail term of three months for default in payment of a fine. Nonetheless, the Saskatchewan Bill of Rights did not prove to be an effective mechanism to enforce human rights. Not only were the judiciary reluctant to convict, but complaints laid under the Act were few, and fines proved to be an ineffectual remedy.

By the 1950's the provinces, in an attempt to establish more effective law enforcement of human rights, began to pass Fair Employment and Accommodation Practices Acts.[1] At the same time many provinces were beginning to expand the list of prohibited grounds of discrimination to include sex and age. As well, equal pay legislation was also being enacted by many of the provinces, which sought to prohibit the disparity in wages between men and women who performed the same work.[2]

The Fair Employment and Fair Accommodation Practices Acts were not as effective as was necessary largely because, in the words of Walter Tarnopolsky, "this legislation continued to place the whole emphasis of promoting human rights upon the individual who had suffered most, and who was therefore in the least advantageous position to help himself... The result was that very few complaints were made, and very little enforcement was achieved."[3]

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To remedy this problem the Provincial and Federal Governments, during the 1960's and 1970's, began to enact comprehensive Human Rights Codes with Human Rights Commissions to administer the Codes. The two important advantages which the Human Rights Codes have over the previous legislation is: 1) the human rights codes dealt with discrimination in a number of areas, such as commercial and dwelling units and advertising, not just employment and accommodation; and 2) the commissions were given the authority to receive and investigate complaints and to carry the complaints through to the adjudication process, thus relieving the complainant of the sole responsibility for the carriage of the complaint.[4] In addition, most Human Rights Commissions are charged with the responsibility to engage in public education in the area of human rights.

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[1] Governments which enacted Fair Employment Practices Acts were Ontario, 1951; Manitoba, 1953; Nova Scotia, 1955; New Brunswick, 1956; British Columbia, 1956; Saskatchewan, 1956' Quebec, 1964; Federal Government, 1953: and in regards to Fair Accommodation Practices Acts, Ontario, 1954; Saskatchewan, 1956; New Brunswick, 1959; Nova Scotia, 1959; Manitoba, 1960; British Columbia, 1961.

[2] Governments which enacted Equal Pay Statutes were Ontario, 1951; Saskatchewan, 1952; British Columbia, 1953; Manitoba, 1956; Nova Scotia, 1956; Alberta, 1957; Prince Edward Island, 1959; New Brunswick, 1960; Federal Government, 1956.

[3] Tarnopolsky, W. S. Discrimination and the Law, Richard de Boo: Toronto, 1982, p. 29.

[4] ibid., p. 31.

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VII THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

A. Impact of the Charter

1. On Federal and Provincial Legislation

Part I, Schedule B, of the Constitution Act is the Canadian Charter of Rights and Freedoms. As a constitutional document, the Constitution Act is preeminent over legislation passed by Parliament or the provincial legislatures, or in other words, the Constitution Act represents a minimum standard to which all legislation must conform. If a law or regulation conflicts with the rights, privileges or duties set out in the Constitution Act, then that legislation is invalid to the extent of the conflict. As part of the Constitution Act, the Canadian Charter of Rights and Freedoms guarantees to all Canadians the rights and freedoms set out in it, and laws which infringe these rights can be invalidated by the courts.

2. On the Role and Function of the Courts

As stated earlier, prior to the adoption of the Charter, Parliament and the provincial legislatures had an unfettered ability to enact laws on matters within their jurisdiction. The courts would strike down legislation as unconstitutional only when the legislation in question did not conform to the division of powers set out in the British North America Act. The courts would strictly construe a statute which infringed a civil liberty, nonetheless if the matter was within the jurisdiction of the enacting legislature, the courts had no authority to invalidate the legislation.

The courts have always been the arbiters of the constitution, but today legislatures must not only respect the division of powers

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set out in the Constitution Act, they must also respect the rights and freedoms guaranteed by the Charter. By curtailing the previously unfettered legislative power of government, the Charter represents a stepping away from the doctrine of legislative supremacy. The Charter gives to the courts additional grounds upon which to scrutinize legislation for it will be the responsibility of judges to define and interpret the rights outlined in the Charter. Their decisions will determine to a large extent the impact of the Charter on Canadian society and this will enhance the role of the judiciary in developing social policy in Canada.

B. The Administration of the Charter

S. 24(1) of the Charter contains an enforcement provision. It states:

> 24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

On its face, s. 24(1) suggests that individuals may appear before a court and utilize the Charter in private or a public cause of action: a private cause of action meaning a private individual complaining to a court about discrimination practised by some other individual eg. a landlord or an employer; a public cause of action meaning a private individual complaining to a court about a governmental action which is discriminatory.

S. 24 must however be read in the light of s. 32. S. 32 outlines the application of the Charter, and reads:

32(1) This Charter applies

a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

b) to the legislatures and government of each province in respect of all matters within the authority of the legislature of each province.

This section indicates the Charter pertains only to matters within the authority of Parliament or the provincial legislatures or in other words, an application under the Charter can only be made when a government has acted in some way. S. 24 cannot be used to support an action between private citizens.

The Charter was worded in this way so that private citizens would exhaust the remedies available to them under existing Human Rights Codes, before instituting an action before the courts. It was not considered desirable to provide an administrative remedy (ie. a remedy achived via a provincial human rights commission) concurrent with a judicial remedy. This ought not to be detrimental to actions between private citizens because, to be constitutional, the provincial Human Rights Codes will have to provide at least as much protection as that offered by the Charter. If a provincial Human Rights Code fails to provide as much protection as the Charter then a private citizen could, under s. 24, launch an action against the government challenging the constitutionality of the Code, for that would be a public form of action. Other forms of governmental action which could give rise to a public form of action would be the administration of justice, prosecution of criminal offences, actions taken by governmental administrative agencies, municipalities or other organizations acting under the authority of a statute, or individuals connected with government who act in an official capacity.

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C. General Provisions of the Charter

The Charter includes certain sections which are general statements of principle designed to guide the courts in interpreting the more specific sections of the Charter. The following is a discussion of these interpretive sections.

1. s.1 The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

That no rights are absolute is a truism which almost everyone understands. As noted earlier, freedom of speech has never meant that a society ceases to prohibit libel, slander or sedition. Even in those countries whose constitutions speak of rights as though they are absolute, the courts have always injected "reasonability" into constitutional interpretation. Therefore, s. 1 merely states explicitly what has generally been assumed, namely, that rights and freedoms must be given a reasonable interpretation.

What is in fact "reasonable" is a difficult question and answers to it will vary widely according to the circumstances. Whatever the limits courts will think reasonable, S. 1. would appear to require that such limits be "demonstrably justified".

2. s.25 The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including
   a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and
   b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

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S. 25 was included in the Charter in response to concerns expressed by native persons that the equality rights included in s. 15(1) of the Charter may limit or extinguish some of the unique rights or privileges enjoyed by them. Furthermore, s. 15(1) may have provided obstacles to the development of Indian self government. S. 25 asks the courts to respect the singular status of native peoples in Canada. The rights of native people in Canada are reaffirmed in s. 35, Part II of the Constitution Act.

(C. F. Whyte. J. D. "Effect of the Canadian Charter of Rights and Freedoms on Non-Criminal Federal and Provincial Law and Regulations" presented to the Saskatchewan Continuing Legal Education Seminar on the Canadian Charter of Rights and Freedoms at Saskatoon and Regina on April 10 and 17, 1982 respectively.)

3. s. 27 This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Prior to the adoption of the Charter, various cultural and ethnic groups expressed concern that traditional social, cultural, and political practices may be attacked by the equality provisions of s. 15(1). As a result of strong lobbying, s. 27 was included to meet the concerns of these groups. The question is whether the courts will agree that the denial of equality rights enhances multiculturalism.

(C. F. Whyte, ibid 7).

4. s. 28 Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

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As has been shown, ss. 25 and 27 may invite the courts to allow discrimination on the basis of sex. Women's groups across Canada launched a powerful and successful lobby to have s. 28 included in the Charter. The opening phrase of s. 28 "Notwithstanding anything in this Charter" strongly suggests that any law or governmental activity which permits discrimination on the basis of sex cannot be upheld by resort to either s. 25 or s. 27.

(C. F. Whyte, ibid, p.7)

5. s. 29 Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

This section prevents an application of the Charter which would limit the constitutional rights granted to separate schools which they have enjoyed since 1867. In particular, s. 29 would likely preclude the application of s. 15(1) so as to prevent separate schools from discriminating on the basis of religious belief.

6. s. 26 The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

This section does not refer to rights granted by statute because the Charter by definition takes precedence over legislation by establishing limits to legislative power.

A similar provision exists in the ninth amendment to the American Constituion. Although American courts have expressed confusion over what the ninth amendment means, some have suggested

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it refers to unspecified rights, the denial of which would violate fundamental principles of liberty and justice. It remains to be seen whether Canadian courts will speculate what those rights might be in a Canadian context.

7. s. 33(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

(2) An Act or provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

(4) Parliament or a legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

S. 33(1) contains the override provision. Fundamental freedoms, legal rights and equality rights can be denied or infringed by either Federal or Provincial legislation if Parliament or legislature expressly declares that the legislation shall operate notwithstanding the Charter.

Legislative override is qualified by s. 33(3) which states that the override provision in a statute ceases to have effect five years after it is passed, whereupon the legislation becomes subject once more to the Charter, unless the override provision is re-enacted (s.33(4)).

The limitations placed on the override provision in s. 33(1) are designed to expose overriding legislation to political debate. The very use of the override provision implies at least

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the derogation of some Charter rights. Legislatures or Parliament will have to provide detailed and cogent reasons why the override was necessary under the circumstances. If governments do not sufficiently explain the use of the override, they will easily be branded anti-civil libertarian, and provided the Canadian political system remains healthy, that is a label governments cannot afford. For these reasons, it is expected that the override will be rarely used.

D. Specific Guarantees of the Charter

1. Fundamental Freedoms

Section 2 of the Charter lists fundamental freedoms which are protected. It reads:

> Everyone has the following fundamental freedoms:
> a) freedom of conscience and religion
> b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication
> c) freedom of peaceful assembly; and
> d) freedom of association.

Prior to the Charter, when civil liberties did not receive direct constitutional protection, fundamental freedoms such as religion, speech or assembly were defined as that which the government did not forbid (see p. 27). For example, a person was free to speak insofar as what he/she said was not slanderous, blasphemous, seditious or obscene. A person was free to assemble with others so long as the association did not constitute a riot, an unlawful assembly, a breach of the peace or an illegal picket. This way of defining fundamental freedoms was a direct result of the doctrine of legislative supremacy.

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But the tables are turned now that fundamental freedoms are entrenched in the Constitution (and provided legislative override is not used). No longer are fundamental freedoms subject to legislation, rather it is legislation which must conform to the preservation of fundamental freedoms and human rights. This does not suggest that the past is ignored in defining the fundamental freedoms of section 2. Entrenchment of rights does not mean that slander and obscenity are now legal or that persons can now engage in sedition against state, but on the other hand neither are rights and freedoms solely determined by past definitions or by what legislatures deem socially or politically expedient.

The rights and freedoms contained in section 2 of the Charter are fundamental rights citizens have against their government and in a strong sense are "moral rights made into legal rights by the Constitution".[1] If governments seek to limit a fundamental freedom such as free speech, there must exist a competing right which is equally important and their action must be justified by a significant overriding concern of major public benefit, such as the prevention of sedition, slander or obscenity. That is the point of entrenching human rights and freedoms in a constitution, and those are the "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

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[1] Dworkin, Taking Rights Seriously, Harvard University Press, Cambridge, Mass., p. 190.

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2. Equality Rights

Section 15(1) of the Charter states:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

a) "Every individual is equal before and under the law..."

This opening phrase of section 15(1) incorporates Justice Ritchie's distinction between "equality before the law" and "equality under the law" (see p. 46). It appears therefore that section 15(1) overrules the Lavell case and would suggest that equality before and under the law means something more than merely guarantee of due process in the administration of the law.

b) "...and has the right to the equal protection and equal benefit of the law without discrimination..."

Laws and practices which appeared to discriminate against certain groups were often upheld despite the Bill of Rights, if the Federal Government could demonstrate that the law or practice in question was part of a legitimate federal purpose designed to benefit and not detract from a particular class. Section 15(1) declares that everyone is entitled to the equal benefit of the law. As a result, the "valid federal purpose test" developed to interpret the Bill of Rights may not survive the opening words of section 15(1)

c) "...and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

Section 15(1) establishes egalitarianism as a basic principle of Canadian constitutional law, by forbidding discrimination against certain classes or goups of persons. Section 15(1) is to be read however, in the light of other sections of the Charter.

Section 1 invites the courts to interpret section 15(1) in a reasonable manner but nonetheless requires discriminatory legislation to be "demonstrably justified". For example, it would be justifiable to engage in age discrimination to prevent the sale of liquor to minors, whereas it would not be justifiable to forbid the sale of liquor on the basis of the other enumerated grounds.

In a similar way the Indian Act confers special rights and benefits upon native people, and so would appear to infringe section 15(1). Section 25 however, reaffirms the unique position of native people in Canada by requiring the courts to interpret section 15(1) so as not to "abrogate or derogate" native rights (see p. 52).

Since section 28 guarantees equality of rights between men and women "notwithstanding anything in this Charter", it is doubtful whether any form of sex discrimination is allowable.

Section 15(1) also states that discrimination is forbidden in particular on the basis of the listed grounds. This open-ended wording suggests there are classes or groups of persons not specifically named which could in the future receive some protection.

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Section 15(2) permits the establishment of affirmative action programs even though such programs may technically be in breach of section 15(1).

3. Legal Rights

Sections 7 to 14 of the Charter list certain rights individuals have in regard to law enforcement and the administration of justice by the courts. Several of these sections are restatements of existing statutory provisions and common law rules, whereas others represent an expansion of existing rights.

Section 7 guarantees the right to life, liberty and security of the person and the right not to be deprived of these except in accordance with principles of fundamental justice. Section 8 forbids unreasonable search and seizure and section 9 prohibits arbitrary detention and imprisonment. It remains to be seen how these general statements of principle will be applied in specific situations. Similar provisions exist in the American Constitution and in the United States they have spawned an enormous amount of judicial comment. It will therefore take time to determine the exact impact of sections 7 to 9 on the administration of justice in Canada.

A similar provision is section 12, which states everyone has the right not to be subjected to cruel and unusal punishment.

Sections 10 and 11 are more specific. Section 10 requires an arresting officer to promptly inform a person arrested of the reasons for the arrest; he must also without delay inform the arrested person of his/her right to retain and instruct legal counsel. The arrested person is also given the right to have

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the legality of his/her detention reviewed by a court, and if the detention is not lawful, the detainee must be promptly released. (see s. 10(c)).

Section 11 outlines the legal rights of a person who is lawfully charged with an offence. Many of the rights in section 11 were granted in the past by the Criminal Code or by longstanding common law rules. Section 11 reads:

> Any person charged with an offence has the right
>
> a) to be informed without unreasonable delay of the specific offence;
>
> b) to be tried within a reasonable time;
>
> c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
>
> d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
>
> e) not to be denied reasonable bail without just cause;
>
> f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;
>
> g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;
>
> h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and
>
> i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

By vitue of section 13, a witness who gives evidence in a trial cannot be incriminated in a subsequent trial by the evidence

given in the previous trial, except in the case of perjury or contradictory evidence. A similar provision previously existed in federal and provincial evidence acts, but the protection of the evidence acts had to be specifically requested by the witness at the time the evidence was given. Under section 13 the protection is given whether or not the witness requests it.

Section 14 gives any person involved in a court proceeding the right to an interpreter if they do not speak the language used in the proceeding or if they are deaf.

4. Democratic Rights

Section 3 of the Charter guarantees the right of all citizens to vote in federal and provincial elections. Section 4(1) sets a 5 year maximum term for the House of Commons and the Provincial Legislatures, but the term may be extended under special circumstances (s.4(2)). Section 5 requires Parliament and the Legislatures to sit at least once every 12 months.

5. Mobility Rights

Section 6(1) of the Charter guarantees to every citizen the right to enter, remain in or leave Canada. In addition, citizens who are permanent residents of Canada have the right to move to reside and earn a living in any province (6(2)). Certain exceptions are made for affirmative action programs or for laws of general application based on reasonable residency requirements for the receipt of publicly funded social services (ss. 6(3), (4)).

6. Language Rights

Section 16(1) of the Charter recognizes English and French as the two official languages of Canada and guarantees equality

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of status and rights for both languages in areas of Federal jurisdiction. Sections 17(1), 18(1), 19(1), and 20(1) expand on the guarantee of s. 16(1) by citing more specific instances where both English and French must be used, eg. parliamentary proceedings, records and governmental communications.

Similarly s. 16(2) establishes bilingualism in New Brunswick and guarantees the equality of English and French in that province. Sections 17(2), 18(2) and 19(2) state specifically that everyone has the right to use English and French in the legislative proceedings, records and governmental communications of New Brunswick.

None of the specific provisions above limits the ability of Parliament or a Provincial Legislature from advancing the equality of English or French (s.16(3); nor do they derogate from language privileges granted by other constitutional provisions (s. 21).

Furthermore, sections 16 to 20 are not to derogate or abrogate any legal or customary right pertaining to languages other than English or French. (s. 22).

APPENDIX

THE CANADIAN BILL OF RIGHTS
1960 (Can.)

CHAPTER 44

An Act for the Recognition
and Protection of Human Rights
and Fundamental Freedoms.

[Assented to 10th August, 1960.]

The Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions;

Affirming also that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law;

And being desirous of enshrining these principles and the human rights and fundamental freedoms derived from them, in a Bill of Rights which shall reflect the respect of Parliament for its constitutional authority and which shall ensure the protection of these rights and freedoms in Canada:

THEREFORE Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

PART I

BILL OF RIGHTS

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

(a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;
(b) the right of the individual to equality before the law and the protection of the law;
(c) freedom of religion;
(d) freedom of speech;
(e) freedom of assembly and association; and
(f) freedom of the press.

2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgment or infringement of any of the rights

or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

(a) authorize or effect the arbitrary detention, imprisonment or exile of any person;

(b) impose or authorize the imposition of cruel and unusual treatment or punishment;

(c) deprive a person who has been arrested or detained

(i) of the right to be informed promptly of the reason for his arrest or detention,

(ii) of the right to retain and instruct counsel without delay, or

(iii) of the remedy by way of *habeas corpus* for the determination of the validity of his detention and for his release if the detention is not lawful;

(d) authorize a court, tribunal, commission, board or other authority to compel a person to give evidence if he is denied counsel, protection against self crimination or other constitutional safeguards;

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

(f) deprive a person charged with a criminal offence of the right to be presumed innocent until proved guilty according to law in a fair and public hearing by an independent and impartial tribunal, or of the right to reasonable bail without just cause; or

(g) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak the language in which such proceedings are conducted.

3. The Minister of Justice shall, in accordance with such regulations as may be prescribed by the Governor in Council, examine every proposed regulation submitted in draft form to the Clerk of the Privy Council pursuant to the *Regulations Act* and every Bill introduced in or presented to the House of Commons, in order to ascertain whether any of the provisions thereof are inconsistent with the purposes and provisions of this Part and he shall report any such inconsistency to the House of Commons at the first convenient opportunity.

4. The provisions of this Part shall be known as the *Canadian Bill of Rights*.

PART II

5. (1) Nothing in Part I shall be construed to abrogate or abridge any human right or fundamental freedom not enumerated therein that may have existed in Canada at the commencement of this Act.

(2) The expression "law of Canada" in Part I means an Act of the Parliament of Canada enacted before or after the coming into force of this Act, any order, rule or regulation thereunder, and any law in force in Canada or in any part of Canada at the commencement of this Act that is subject to be repealed, abolished or altered by the Parliament of Canada.

(3) The provisions of Part I shall be construed as extending only to matters coming within the legislative authority of the Parliament of Canada.

6. Section 6 of the *War Measures Act* is repealed and the following substituted therefor:

"6. (1) Sections 3, 4, and 5 shall come into force only upon the issue of a proclamation of the Governor in Council declaring that war, invasion or insurrection, real or apprehended, exists.

(2) A proclamation declaring that war, invasion or insurrection, real or apprehended, exists shall be laid before Parliament forthwith after its issue, or, if Parliament is then not sitting, within the first fifteen days next thereafter that Parliament is sitting.

(3) Where a proclamation has been laid before Parliament pursuant to subsection (2), a notice of motion in either House signed by ten members thereof and made in accordance with the rules of that House within ten days of the day the proclamation was laid before Parliament, praying that the proclamation be revoked, shall be debated in that House at the first convenient opportunity within the four sitting days next after the day the motion in that House was made.

(4) If both Houses of Parliament resolve that the proclamation be revoked, it shall cease to have effect, and sections 3, 4 and 5 shall cease to be in force until those sections are again brought into force by a further proclamation but without prejudice to the previous operation of those sections or anything duly done or suffered thereunder or any offence committed or any penalty or forfeiture or punishment incurred.

(5) Any act or thing done or authorized or any order or regulation made under the authority of this Act, shall be deemed not to be an abrogation, abridgement or infringement of any right or freedom recognized by the *Canadian Bill of Rights*."

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

Guarantee of Rights and Freedoms

Rights and freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Fundamental Freedoms

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

(*a*) freedom of conscience and religion;

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(*c*) freedom of peaceful assembly; and

(*d*) freedom of association.

Democratic Rights

Democratic rights of citizens

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

Maximum duration of legislative bodies

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs at a general election of its members.

Continuation in special circumstances

(2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.

Annual sitting of legislative bodies

5. There shall be a sitting of Parliament and of each legislature at least once every twelve months.

Mobility Rights

Mobility of citizens

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

Rights to move and gain livelihood

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

(*a*) to move to and take up residence in any province; and

(*b*) to pursue the gaining of a livelihood in any province.

Limitation

(3) The rights specified in subsection (2) are subject to

(*a*) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and

(*b*) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

Affirmative action programs

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

Legal Rights

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Search or seizure

8. Everyone has the right to be secure against unreasonable search or seizure.

Detention or imprisonment

9. Everyone has the right not to be arbitrarily detained or imprisoned.

Arrest or detention

10. Everyone has the right on arrest or detention

(*a*) to be informed promptly of the reasons therefor;

(*b*) to retain and instruct counsel without delay and to be informed of that right; and

(*c*) to have the validity of the detention determined by way of ***habeas corpus*** and to be released if the detention is not lawful.

Proceedings in criminal and penal matters

11. Any person charged with an offence has the right

(*a*) to be informed without unreasonable delay of the specific offence;

(*b*) to be tried within a reasonable time;

(*c*) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(*e*) not to be denied reasonable bail without just cause;

(*f*) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(*g*) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

(*h*) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished

for the offence, not to be tried or punished for it again; and

(*i*) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

Treatment or punishment

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Self-crimination

13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

Interpreter

14. A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

Equality Rights

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Official Languages of Canada

Official languages of Canada

16. (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

Official languages of New Brunswick

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

Advancement of status and use

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

Proceedings of Parliament

17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.

Proceedings of New Brunswick legislature

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.

Parliamentary statutes and records

18. (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.

New Brunswick statutes and records

(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.

Proceedings in courts established by Parliament

19. (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.

Proceedings in New Brunswick courts

(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.

Communications by public with federal institutions

20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

(*a*) there is a significant demand for communications with and services from that office in such language; or

(*b*) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

Communications by public with New Brunswick institutions

(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

Continuation of existing constitutional provisions

21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.

Rights and privileges preserved

22. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or after the coming into force of this Charter with respect to any language that is not English or French.

Minority Language Educational Rights

Language of instruction

23. (1) Citizens of Canada

(*a*) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(*b*) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.

Continuity of language instruction

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

Application where numbers warrant

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(*a*) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(*b*) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

Enforcement

Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Exclusion of evidence bringing administration of justice into disrepute

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

General

Aboriginal rights and freedoms not affected by Charter

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(*a*) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(*b*) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

Other rights and freedoms not affected by Charter

26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

Multicultural heritage

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Rights guaranteed equally to both sexes

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Rights respecting certain schools preserved

29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

Application to territories and territorial authorities

30. A reference in this Charter to a province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.

Legislative powers not extended

31. Nothing in this Charter extends the legislative powers of any body or authority.

Application of Charter

Application of Charter

32. (1) This Charter applies

(*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Exception

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

Exception where express declaration

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the

legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

Operation of exception

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

Five year limitation

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

Re-enactment

(4) Parliament or a legislature of a province may re-enact a declaration made under subsection (1).

Five year limitation

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

Citation

Citation

34. This Part may be cited as the *Canadian Charter of Rights and Freedoms*.

CASES CITED

1. Attorney General v. Dupond (1978) 2 S.C.R. 770
2. Boucher v. The King (1951) S.C.R. 265
3. Brownbridge v. The Queen (1972) S.C.R. 926
4. Christie v. York Corp. (1940) S.C.R. 139
5. Hogan v. The Queen (1975) 2S.C.R. 574
6. R. V. Lavell (1973) 38 D.L.R. (3d) 381
7. Regina v. Drybones (1970) S.C.R. 282
8. Regina v. Gonzales (1962) 32 D.L.R.
9. Robertson and Rosetanni v. The Queen (1963) S.C.R. 651
10. Roncarelli v. Duplessis (1959) S.C.R. 121
11. Saumer v. Quebec (1953) 2S.C.R. 299 (1953) 4D.L.R. 641

GLOSSARY OF TERMS

BAIL - In criminal law, is to procure the release of a person from legal custody, by an undertaking that the person in custody will appear before a court at a designated time and place. Commonly, the undertaking is secured by a payment of money to the court, which is forfeited if the person in custody fails to reappear.

BILL OF RIGHTS (American) - is the name given to a series of constitutional amendments made to the American constitution after the American colonies federated in 1789. (which included certain human rights guarantees). The original "Bill of Rights" consisted of ten amendments and were passed by Congress in 1789, and ratified by three-fourths of the states in 1791. Subsequent amendments were added over the years.

BILL OF RIGHTS (Canadian) - is an Act of the Parliament of Canada, passed in 1960, which declares that certain rights (freedom of speech, religion, assembly, the press and life, liberty and security of the person) shall exist without discrimination based on race, national origin, colour, religion or sex. The Bill of Rights applied only to areas under the jurisdcition of the federal government of Canada.

BRITISH NORTH AMERICA ACT -is an Act of the United Kingdom Parliament which in 1867 created the Government of Canada by federating Ontario, Quebec, Nova Scotia and New Brunswick. Manitoba joined in 1870, British Columbia in 1871, Prince Edward Island in 1873, Alberta and Saskatchewan in 1905, and Newfoundland in 1949. Until the Constitution Act, 1981, the British North America Act contained the major part of Canada's written constitutional law (eg. establishment of Parliament and the Legislatures, division of federal and provincial powers, establishment of a separate judiciary, etc.).

BY-LAW - The local laws or municipal statutes of a city or town which has been delegated the authority, usually from a provincial legislature, to enact such legislation. It can also mean the regulations or rules adopted by an association or corporation operating under authority of a statute.

CANADIAN CHARTER OF RIGHTS AND FREEDOMS - Forms Part I, Schedule B of the Constitution Act, and outlines the human rights and freedoms which are given constitutional protection in Canada.

CIVIL LIBERTIES - Prior to the Canadian Charter of Rights and Freedoms, civil liberties existed in the absence of legal rules; what the law did not forbid was a civil liberty eg. the civil liberty of free speech existed to the extent that the law did not forbid it. The Charter however, protects rights of conscience, religion, though, belief, opinion and expression, the press, peaceful assembly and freedom of association as well as "legal" rights, from legislative encroachment and these Charter rights are called civil liberties.

CIVIL RIGHTS - In Canadian usage refers to the rights granted to the provinces by section 92(13) (Property and Civil Rights in the Province) of the Constitution Act. These are rights pertaining to private law and are primarily composed of proprietary, contractual and tortious rights.

- In American usage, generally speaking, the term 'civil rights' refers to the body of rights which in Canada are described as civil liberties.

COMMON LAW - As distinct from enactments of legislatures, common law refers to those legal rules and principles which derive their authority from judicial custom and tradition and which have been recognized and affirmed by the courts.

COMMUNITY - Political Community - community understood from a political perspective in which individuals of a community play a role in the political life and organization of a community.

COMPETENCE - (Legislative Competence) - legal authority to pass law. The Constitution Act 1981 (former British North America Act) assigned to Parliament and the provincial legislatures broad areas of legislative jurisdiction, so that either level of government was not competent to pass legislation on topics or concerns which were properly the exclusive concern of the other.

CONSTITUTION - The fundamental law of a nation or state, which may be written or unwritten, establishing the character and orgnaiztion of its government, regulating, distributing and limiting the functions of its different levels and departments, and prescribing the extent and manner of the exercise of sovereign powers.

CONSTITUTION ACT (1981) - Forms the major part of Canada's written constitutional law. Its forerunner was the British North America Act and much of the British North America Act is retained in the Constituion Act. The most notable additions however, are the Canadian Charter of Rights and Freedoms, the Amending Formula and provisions dealing with Aboriginal rights.

DEFAMATION - see slander and libel - The offense of injuring a person's character or reputation by false and malicious statements as by slander or libel.

DISALLOWANCE - s. 90 of the British North America Act gave the Federal government the power to disallow (invalidate) provincial legislation. It was often used by the dominant Federal government in the early years of confederation. Over the years the provinces insisted that the constituionality of provincial legislation be determined by the courts, and that the wisdom of provincial legislation be determined by the voters, not the Federal government. Today the disallowance power is a dead letter and has not been used by the Federal government since 1943.

DUE PROCESS - In Canada, refers to the exercise of legal authority by procedures which respect the rule of law and principles of fundamental justice.

EGALITARIANISM - Political and social equality--the belief in or espousal of social and political equality.

FRANCHISE - The right to vote; suffrage.

INDIAN ACT - An act of the Federal parliament dealing with the administration of Indian reserves and Indian affairs generally.

INJUNCTION - An order issued by a court forbidding a party from doing some act which he/she is threatening to do, or forbidding the continuance of an act which is unjust or injurious to the complainant.

INTERNATIONAL COVENANTS (United Nations) - International Covenant on Civil and Political Rights; International Covenant on Social Cultural and Economic Rights; - are international agreements enjoining the signing countries to respect the rights contained in them. Canada is a signatory to both Covenants as well as the optional Protocol Agreement which establishes a United Nations administrative review of the observance of both Covenants in those countries which have signed the Protocol Agreement.

JURISDICTION - The authority, power or right to act. In the legislative sphere the Constition Act sketches the authority or jurisdiction of the federal and provincial governments. Similarly the authority or jurisdiction of the courts is established by certain federal and provincial legislation.

LEGISLATIVE SUPREMACY - The doctrine that parliament and the legislatures have an unfettered ability to pass laws on any subject matter within their jurisdiction.

LIBEL - A form of defamation expressed by print, writing, pictures or signs, which is malicious and false and is of such a nature as to injure the character, reputation, trade or business of a person.

LORD'S DAY ACTS- Are federal and provincial statutes which set aside Sunday as a mandatory holiday.

NATURALIZATION - The conferral of citizenship upon a foreigner or alien making the foreign person the same in respect to rights and privileges as if he were a native born citizen.

ORDER-IN-COUNCIL - Statements issued by either federal or provincial cabinets, made under authority of statute, and which have the force of law, but because they do not emanate from a legislature are not subjected to political debate.

PADLOCK ACT - An act of the provincial legislature of Quebec, passed in 1937 which in broad language declared it illegal to use a house for the propogation of Communism or to use a house to print, publish or distribute a document promoting Communism, and provided for the placing of a padlock on such a house under the authority of the Attorney-General of Quebec.

POSITIVE LAW - Law actually and specifically enacted or adopted by proper authority of government (eg. statutes, regulations, etc.).

PRIVY COUNCIL (Judicial Committee of the Privy Council) - a tribunal established in 1833, composed of judges or retired judges who were members of the Privy Council, and who acted as advisers to the English Monarch in matters of law referred to it. It was Canada's final court of appeal until 1949.

REPEAL - The revocation of a previously existing law by the enactment of a subsequent statute which declares that the former law shall be revoked, or which contains provisions so contrary to or irreconcilable with the previous legislation that only the latter can remain in force (implied repeal).

SEDITION - The offense of publishing, verbally or otherwise, any words or document with the intent of exciting disaffection, hatred or contempt against the government, or to attempt to alter the government by illegal means.

SLANDER - A false and malicious statement concerning a person which is made orally which injures another in his reputation, trade or means of livelihood and which gives rise to an action for damages.

STATUTE - An Act of a legislature which by law declares, commands or prohibits something; the written will of a legislature.

WAR MEASURES ACT - An Act of the Parliament of Canada, originally passed in 1917 which in times of real or apprehended war, invasion or insurrection allows the Federal Government (ie. the Cabinet) to unilaterally suspend civil liberties without the approval of Parliament.